

# THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS THE GLOBALIZATION ERA 2020

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# **The 2nd Proceeding**

## **"Indonesia Clean of Corruption in 2020"**



**"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"**



**IMAM AS SYAFEI BUILDING**  
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**THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND  
THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS  
THE GLOBALIZATION ERA 2020**

**K h a l i d**

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*Abstract*

The process of globalization continues to roll and will enter the year 2020, not only the problem of economic life, but has been plagued in the globalization of politics, defense and security, science and technology, social, cultural, and legal. Globalization in politics can not be separated from the movement of human rights, transparency and democratization. Globalization in the movement of human rights, then Indonesia must incorporate human rights instruments internationally recognized by UN countries into the positive law of national accordance with Indonesian culture by strengthening the institutions of protection and the enforcement of human rights, institution of study, and the wider community to play a role in promote and protect human rights on the lives of the peoples of Indonesia.

Quite whether or not the recognition and the protection of the rights of citizens does not necessarily only by ratifying and many articles regulating rights of citizens, but the constitution still must be written with clear and complete for the human rights of citizens, the most important thing then is the political will and consistency run those chapters in the behavior of national and state level, and this can be released necessity of institutions that maintain, run and oversee the realization of the recognition, protection and enforcement of human rights.

Keywords: Institutional Independence, Protection and Enforcement of Human Rights, Globalization Era.

**A. Introduction**

Protection of human rights is an absolute demand for justice for the opposite, injustice, unwanted. Evidence for this claim is the birth of motion as follows. *First*, constitutionalization and internationalization of human rights aspects of substantive law to determine the scope of human rights. *Second*, the establishment of institutions and national and international mechanisms for protection both judicial and non-judicial. *Third*, corrective justice for the injustice inflicted through various practices of human rights violations both past and present in the form of responsibility and liability of individual players and the state.<sup>1</sup>

The setting of human rights realized that the necessary followed by the institutions that deal with education and law enforcement problems of human rights in Indonesia, so comes

<sup>1</sup> Titon Slamet Kurnia. *Constitutional Rights, the Constitution 1945 of the Republic of Indonesia and the Constitutional Court*, Pustaka Pelajar, Yogyakarta, 2014, p. 35.

<sup>1</sup> The Indonesian National Commission on Human Rights of regulated by Presidential Decree No. 50 of 1993 on The Indonesian National Commission on Human Rights, which is then amplified by Act Number 39 1999 on human rights. After the birth is also the <sup>1</sup> National Commission on Violence Against Women is regulated by Presidential Decree No. 181 of 1998, which was then set back in Presidential Decree No. 65 of 2005. Furthermore, also born Child Protection Commission, which is regulated by Presidential Decree No. 36 of 1990, Jo. Number 77 of 2003 on the Indonesian Child Protection Commission, which is then amplified by <sup>3</sup> Act No. 35 of 2014 on the Amendment of Act No. 23 of 2002 on Child Protection. The next birth is also the <sup>1</sup> Witness and Victim Protection Agency, as well as the Ombudsman of the Republic of Indonesia.

These institutions have the same authority in the field of <sup>1</sup> protection and enforcement of human rights, the differences lie only on the particulars of the authority of <sup>8</sup> The Indonesian National Commission on Human Rights which has a function in general and addressing grave human rights, while the National Commission for Women on violence against women, and the Indonesian Child Protection Commission on child abuse. As well as the guarantee of protection of witnesses and victims of the Agency, and the service is good and the quality of the public from the government to the Ombudsman of the Republic of Indonesia. Some <sup>1</sup> indeed have this commission functions and powers of the estuary is to provide education, protection, and enforcement of human rights in Indonesia.

In following the globalization and ratified most of the international law that occur are changes in the legislation are not necessarily felt in realities. So when the ratification of an international treaty <sup>1</sup> in the field of human rights often stop the ratification process. Do not do follow-start the transformation into national law, mamberi understanding to law enforcement officials or institutions that uphold of human rights.<sup>2</sup> Why has not implemented the harmonization of laws and regulations that govern the independence of institutions that uphold the human rights? Interesting to study in order not only to ratify because of the pressure of globalization the world.

## B. A Study on The Independency of The Institution

Structuring the legal institutions and the institutionalization of clear laws by arranging these components, so that the development process of law can run harmoniously and focus more on substantial issues. Therefore, there needs to be a mechanism of integration, that the

<sup>2</sup> Muladi. *Human Rights: The Nature, Concepts and Implications in the Perspective of Law and Society*, Refika Aditama, Bandung, 2009, p. 75.

development of the law should include (all-encompassing) all components of the legal system on top, which simultaneously runs through strategic measures, ranging from planning the creation of rules (legislation planning), the manufacturing process (law making process), to the rule of law (law enforcement) that was built by the awareness of law (law awareness).<sup>3</sup>

The first consequence of the recognition of human rights is a deeper understanding of the meaning of democracy. Human rights form the cornerstone of democracy. At the time of forming the country, people do not let go of their human rights, such as the right to live their own life, thus, the people as a whole retains the right to determine this along with the organization of collective life in the state.<sup>4</sup>

In order dynamic state of law, the state is actively involved in efforts to create a welfare society. Thus the set of state functions to the implementation of the rights and obligations of the human rights. On the one hand the state is required to always protect the rights, but on the other hand are required to effectuate the purposes of the public in the form of social welfare. The role of the state that is double this should always be in harmony in the implementation, capable of guaranteeing and protecting human rights following the implementation of the obligations essentially for the purpose of welfare of the people themselves.

The Indonesian National Commission on Human Rights as well as The National Commission on Violence Against of Women, The Indonesian Child Protection Commission, Witness and Victim Protection Agency, and The Ombudsman of the Republic of Indonesia established by Presidential Decree, the Presidential Decree, and the Act. However, these institutions can be said to represent one state agency that has the same constitutional importance to prosecutors and police. Why is that? Because in every constitutional state, human rights guarantees in the Constitution are considered as absolute existence. Even the constitutional guarantees of human rights was a fundamental feature of state law or understanding of constitutional democracy (constitutional democracy). To promote and protect human rights in Constitution 1945, countries need to form a separate state institution. However, because such institutions is unusual set specifically in the constitution, but is usually set specifically in the Act.<sup>5</sup>

The institution of state established under or because they were given power by the Constitution, some are formed and get its power from the Act, and even some are only

<sup>3</sup> *ibid.*, p. 33.

<sup>4</sup> Adnan Buyung Nasution. *Aspiration of Constitutional Government in Indonesia, Socio-Legal Studies on Constituentie 1956-1959*, Pustaka Utama Grafiti, Jakarta, 2001, p. 176.

<sup>5</sup> Jimly Asshiddiqie, *Development and Consolidation of the State Institute of Post-Reform*, Sinar Grafika, 2012, p. 210.



established by Presidential Decree. Hierarchy position of course depends on the degree of regulation according to the legislation in force. State agencies are governed and shaped by the Basic Law is a constitutional organ, while established under the Act is an organ of the Act, while only formed because of the Presidential Decree of course lower levels and the degree of legal treatment of the officials who sat in it.<sup>6</sup>

The independence of the institution, characterized by several things:

1. Organizational and administrative autonomy;
2. Autonomy budget or budget;
3. Professional and ethical requirements of membership;
4. The certainty of tenure;
5. The authority of each apparatus to make decisions that are independent and binding;
6. The provisions on conflicts of interest and guidelines for high standards of behavior; and
7. Public access to information.<sup>7</sup>

Progressive enforcement of human rights law can not be released by law enforcement institutions of human rights itself. More certain legal status, independence, power, and clear direction of its authority, the greater the potential for the institutions to take steps progressive law enforcement. But on the contrary, increasingly unclear legal basis and authority, as well as the independence of the institution, it would be difficult encourages human institutions and law enforcement was acting progressively. Therefore, institutional reform is expected to create a situation conducive supporting human institutions and progressive of law enforcement to enforce the law to protect of human rights.<sup>8</sup>

One of the main causes of the birth of this commission is the erosion of public confidence in state institutions conventionally. Public distrust that push the presence of the state commission that is desired provides a new, more reliable performance. US experience confirms the relation between the doctrine of public trust with the presence of federal agencies.

Given the Reagan Administration's environmental policies and the uncertainty of its successor's policies, it appears that now, more than ever, new legal tools are necessary to

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<sup>6</sup> *Ibid.*, p. 37.

<sup>7</sup> Jamal Wiwoho. *Law Enforcement Agenda and its Relevance in the Nation*, the National Seminar Papers in the Faculty of Law Unissula, in [www.jamalwiwoho.com](http://www.jamalwiwoho.com), Semarang January 22, 2013, p. 17.

<sup>8</sup> Suparman Marzuki. *The Human Rights Court in Indonesia; Impunity Perpetuates*, Penerbit Erlangga, Jakarta, 2012, p. 255.

protect public land against politically motivated federal agencies. The public trust doctrine, if clarified and strengthened, may be of future use against federal agency actions.<sup>9</sup>

In Indonesia, the distrust of the seriousness of the handling of human rights issues, gave birth to the Commission, the National Commission on Violence Against Women, and the Indonesian Child Protection Commission, and had also been born of Truth and Reconciliation Commission, which was abolished by the Constitutional Court's decision. Also born Witness and Victim Protection Agency, as well as the Ombudsman of the Republic of Indonesia. Constitutional Court's decision to eliminated truth and Reconciliation Commission were appropriate because of lack of institutional and overlapping authority with the existing commission.

Furthermore, from an institutional, some of these commissions are recognized as autonomous and independent institution, but has not been regulated independently by the laws of the particularity of this institutional arrangement. There are two (2) dimensions and then undermine the independence of some commissions is, *first*; the independence of institutional arrangements, the Commission is only regulated in the law on human rights, not or no special arrangement with the law on the National Human Rights Commission. Similarly, the Indonesian Commission for Women and The Indonesian Commission Child of Protection, the Indonesian Commission for Women only regulated by Presidential Decree, while The Indonesian Commission Child of Protection stipulated in the law on child protection. *Second*; the independence of institutional authority, the Commission shall make recommendations on a case of human rights violations to the President and Parliament. While The Indonesian Commission for Women and The Indonesian Commission Child of Protection convey to the President, as well as with Witness and Victim Protection Agency and the Ombudsman.

According to Backer, these interactions affect not only national legal systems of substantive laws, increasingly, interaction has led to harmonization of constitutional norm.<sup>10</sup>

So we need harmonization of human rights in the national legal systems of some provisions, interactions and institutions in a constitution. It is also considering the respective institutional human rights in Indonesia have each authority as an institution. For that really matters to synergize each of these institutions for institutional to international human rights

<sup>9</sup> Susan D. Baer. *The Public Trust Doctrine A Tool to Make Federal Administrative Agencies Increase Protection of Public Law and Its Resources*, Boston College Environmental Affairs Law Review Vol. 15, 1988, p. 386.

<sup>10</sup> Larry Cata' Backer. *Harmonizing Law in an Era of Globalization, Convergence, Divergence, and Resistance*, Carolina Academic Press, Durham, North Carolina, 2007, p. 13.

law confirms that national human rights enforcement authority takes precedence over into the realm of international law, as affirmed by Backer below.

A foundational principle in international human rights law is that the role of international enforcement organs is subsidiary to the efforts of national institutions. Although international courts and quasi-judicial bodies may be empowered by treaty to enforce international human rights law, the first and foremost authorities to deal with claims of human rights abuse are the national authorities.<sup>11</sup>

Considering the authority of the Commission as investigator pro-judicial in cases of gross human rights violations in contact with other state institutions, such as Parliament, the Attorney General and the Supreme Court, then if there is a dispute with the state institutions are related to each authority, can not be resolved by The Constitutional Court because the Commission was not called as a state institution as well as the Judicial Commission or the Constitutional Court.<sup>12</sup> Including Similarly, if the tangent with the Government or the President, as it must submit a report of findings and studies conducted by the National Human Rights Commission to the President. Similarly, the National Commission on Violence Against of Women and the Indonesian Child Protection Commission whose authority is in contact with the President having to submit periodic reports, this will further weaken these two institutions if the human rights violations in contact with the government.

### C. Concluding Remarks

The independence of the institution of human rights protection and enforcement is able to carry out the functions and authorities are independent and free of all interference from other state agencies or the government. The existence of legal institutions, which set there in can be seen from the structure of the organization, powers, processes and procedures and working mechanisms. Institutional arrangements that are independent course based on the four settings that institution:

1. The clarity of organization, namely the institution explicitly recognized in the constitution or not, related to recognition as an independent institution, free from interference powers other state agencies or the government. It is not stated explicitly to several institutions of protection and promotion of human rights.
2. The authority, the authority granted to the firm in the constitution or the law, or attributive authority of the government. It can be seen from the respective authority of

<sup>11</sup> *Ibid.*, p. 45.

<sup>12</sup> Suparman Marzuki, *Political of Human Rights Law*, Penerbit Erlangga, Jakarta, 2014, p. 257.

the existing institutions have not shown the independence of the authority if it is associated with the granting of performance reports to the President. Not to mention if it is understood that the performance report contact with the government or the President, if the intention is to exercise its powers who commit human rights violations it is the government or the President.

3. The process and procedure for the appointment several commissions that are also not indicated impartiality and democratic, because his appointment is still under the authority of the President. Mechanism of works, this strengthening ineffective and inefficient because each existing institutions have relatively similar mechanism of action.

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